EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT ROTORUA

CIV-2017-063-000029
[2017] NZDC 23941

BETWEEN	IAN NEVILLE FRITH Plaintiff
AND	ROTORUA DISTRICT COUNCIL Defendant

Hearing:	13 October 2017
Appearances:	Plaintiff appears in Person S Jass for the Defendant
Judgment:	11 December 2017

JUDGMENT JUDGE P W COOPER

The claim

[1] The plaintiff, together with his former wife, owns the property at [address deleted], Ohinemutu, Rotorua. There is no dwelling on the property. The only building on the property is a bathhouse which the plaintiff is in the process of restoring.

[2] The plaintiff asserts that he is not liable for rates on the property. The plaintiff submits:

(a) That his property falls within Clause 3 of Part 1 of Schedule 1 Local Government (Rating) Act 2002 and therefore qualifies as being non-rateable;

(b) That his property is within Ohinemutu Village in Rotorua and is thus included in Ngati Whakaue's claim to the Waitangi Tribunal Wai 384. This claim has yet to be settled. The plaintiff says that his property is included within Ngati Whakaue's claim regarding the rate free status for Ohinemutu provided for in the Fenton Agreement signed in 1880.

(c) The plaintiff says that the defendant has classified part of his property as being within an area of "nationally significant natural areas" and that the defendant has been negligent in breaching a duty of care regarding preservation of historical buildings and has been fraudulent accepting government funding for "nationally significant natural areas" but not applying a percentage of that funding to Ohinemutu.

[3] The plaintiff claims:

(a) $30,000 in respect of the return of overpaid rates and charges on his property from 2000-2016 and compensation for stress;

(b) $10,000 as half compensation for work done by the plaintiff in remedial work towards "nationally significant natural areas";

(c) $100,000 to be made available to the property representatives of the Ohinemutu Historical Restoration Trust to continue with emergency remedial work on identified "nationally significant nature areas" and outstanding natural features and landscapes.

(d) An order requiring the defendant to cease with rate demands on properties within the Ohinemutu area (as defined by the Fenton Agreement) until the Ngati Whakaue claim Wai 384 is settled or determined by the Waitangi Tribunal.

Background

[4] The bathhouse property, the subject of this proceeding, is in Tunohopu Street which is part of the Ohinemutu area. Behind Ohinemutu Village on Lake Road sits

the Lakehouse Hotel. This is an historic building in Rotorua. The bathhouse property, the subject of this proceeding, is below the Lakehouse Hotel and was for many years associated with the hotel. The hotel and the bathhouse property were purchased by the defendant and his former wife in 2002. The plaintiff says that he set about renovating and restoring the hotel and the bathhouse. He advised the Court that subsequently he sold the property on which the hotel itself stands to the Pukeroa Oruawhata Group (an entity of Ngati Whakaue). However, Pukeroa Oruawhata Group did not want the bathhouse property. This has remained in the hands of the plaintiff and his former wife.

[5] The bathhouse property was originally in Maori ownership. The Native Land Court recorded that in 1908 the property was leased by the Maori owners to Moss Davis. He was a prominent businessman of that time in the building and hotel industry. This lease was transferred to LD Nathan & Co Ltd and Hancock & Co Ltd in 1925. The Native Land Court records show that in 1932, the land itself was transferred from Maori ownership to LD Nathan & Co Ltd and Hancock & Co Ltd and a new fee simple Certificate of Title issued CT834/228.

First issue – Does the property qualify for non-rateable status?

[6] Section 7 Local Government (Rating) Act 2002 ("the Act"), provides:

> "(1) All land is rateable.
>
> (2) However, land is not rateable if this Act or another Act states that the land is non-rateable."

[7] Section 8 of the Act provides that the land described in Part 1 of Schedule 1 of the Act is not rateable. Clause 3 of Part 1 of Schedule 1 provides that the following land is not rateable:

> "3 Land that is—
>
> (a) owned by a society or association of persons (whether incorporated or not); and
>
> (b) used for conservation or preservation purposes; and
>
> (c) not used for private pecuniary profit; and

(d) able to be accessed by the general public."

[8] Mr Frith submits that:

(a) He and his wife jointly own the property and therefore it is owned by "an association of persons", satisfying Clause 3(a);

(b) That he is restoring the bathhouse on the property and therefore the land is "used for conservation or preservation purposes", satisfying Clause 3(b);

(c) That he is not deriving any income from the land and therefore it is "not used for any private pecuniary profit", satisfying Clause 3(c); and

(d) That the land is not fully fenced and there is nothing to prevent people from wandering onto the land and therefore the land is "able to be accessed by the general public", satisfying Clause 3(d).

[9] In the case of *Royal New Zealand Foundation for the Blind v Auckland City Council*[1], the Supreme Court referred to the general nature of excluded land:

> "[22] The categories of non-rateable land in Schedule 1, Part 1, of the present Act are diverse but have, generally, an altruistic, charitable, or public service objective or quality. They include, for example, National Parks, reserves, and conservation areas; land used by local authorities for public gardens or children's playgrounds, public halls, libraries and museums; and land used by educational institutions or religious institutions. …"

[10] In relation to Clause 3(a), the reference to "association of persons" must be read in its context alongside the word "society". The definition of "society" as it relates to Clause 3, from the Oxford English Dictionary, is "an organisation or club formed for a particular purpose or activity". The definition of "association" in the context of Clause 3(a) means, "a group of people organised for a joint purpose."[2] Although it may be possible for an association of two persons to fall within Clause 3(a), there is no evidence to show that the defendant and his former wife are

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[1] *Royal New Zealand Foundation for the Blind v Auckland City Council* [2007] NZSC 61
[2] *Oxford English Dictionary*

"an association" as contemplated by that clause. Furthermore, in terms of Clause 3(b), the land must be used by the association of persons for conservation or preservation purposes. The fact that Mr Frith may be restoring the bathhouse building on the property does not in itself fulfil the requirement that the land is "used for conservation or preservation purposes". Restoration of the building is an activity that happens to be happening on the land at the present time, but it does not fulfil the criteria that the land is "used for conservation or preservation purposes".

[11] In summary, I am not satisfied that the land is owned by "an association of persons" as contemplated by Clause 3(a). Nor am I satisfied that the land is being used for conservation or preservation purposes as required by Clause 3(b). Therefore, in respect of the first issue, I find that the land does not come within the exemption in Clause 3, Part 1 of Schedule 1 of the Act.

Second issue – Does the location of the property within the Ohinemutu Village mean that it is exempt from rates?

[12] The starting point again is s 7 of the Act, that all land is rateable unless exempt by the Act or some other legislation.

[13] Mr Frith makes two points in relation to this issue. The first is that the Fenton Agreement signed in 1880 provides for rate-free status for Ohinemutu Village. This particular argument was dealt with in the case of *Tait v Rotorua District Council*[3].

[14] This was a case where Mr Tait argued that his property in Ohinemutu Village was not rateable because of the provisions of the Fenton Agreement. Master Kenndy-Grant's judgment refers to the case of *Rotorua District Council v Wilson*[4] where Judge Trapski rejected the argument that the Fenton Agreement exempts properties in Ohinemutu Village from rating. Master Kennedy-Grant noted that the judgment of Judge Trapski had apparently not been retained in the Court's records, however the High Court had available the report of Judge Gillanders Scott of the Maori Land Court provided to Judge Trapski in the *Wilson* case. The relevant passages of Judge

[3] *Tait v Rotorua District Council* HC Rotorua B28/94, 16 August 1994
[4] *Rotorua District Council v Wilson* (unreported, DC Rotorua 2018/77, 1988/79)

Gillanders Scott report are set out in the *Tait* case. Judge Gillanders Scott's report makes interesting reading and does not need to be reproduced here. Master Kennedy-Grant's summary of the relevant extracts from Judge Gillanders Scott's report is as follows:

> "(a) Clause 13 of the Fenton Agreement did not apply to land within Ohinemutu Village but only to land within the proposed Town (of Rotorua) and was never extended to land within the Village;
>
> (b) As at the date of the Agreement '*the whole of the land comprising the ... Village ... was Maori customary land and such thereof as was unalienated would not in any event have been liable for the payment of rates, if levied.*'
>
> (c) The land within Ohinemutu Village was subjected to rates initially by the Rotorua Town Act 1907 and then by the Rotorua Borough Act 1922."

[15] Master Kennedy-Grant held that land within the Ohinemutu Village was liable for rates.

[16] An added feature of Mr Frith's case is that the land, the subject of this action, was leased by the then Maori owners to European business interests in 1908 and ultimately in 1932 the land itself was transferred from Maori ownership to the brewing and hotel interests of LD Nathan and Co Limited and Hancock and Co Limited, and since that time, the land is held in European freehold title. Although the land has that status, Mr Frith says that it is included within Ngati Whakaue's Waitangi Tribunal claim Wai 384 "The Ohinemutu Village claim". This seems to me to be highly unlikely. In the *Tait* case referred to earlier, the judgment sets out the details of the Ohinemutu Village, claim Wai 384. At the end of the claim, the relief sought from the Waitangi Tribunal is set out as follows:

> "**ACCORDINGLY THE TRIBUNAL** is asked to recommend as follows:
>
> (a) That the Rating Powers Act 1989 (sic) not apply to Ngati Whakaue lands within Ohinemutu Village (as more clearly delineated in red on the attached plan) that **still have ownership by Ngati Whakaue**;
>
> (b) That the Crown compensate Ngati Whakaue for revenue paid by way of rates." (Emphasis added)

[17] Mr Frith's land is not still within the ownership of Ngati Whakaue and would seem not to be covered by the claim. Ngati Whakaue's claim is now the subject of settlement negotiations between Ngati Whakaue and the Crown. Whatever the outcome of those negotiations might be in the future, as the law stands at the moment, Mr Frith's land is subject to s 7 Local Government (Rating) Act and is rateable, and is likely to remain so in the future.

Third issue – Alleged breach of duty of care regarding the upkeep of historical buildings and alleged fraudulent misapplication government funding in relation to nationally significant natural areas

[18] The plaintiff is a private property owner. There is no obligation on the local authority to pay for the upkeep or improvement or restoration of buildings on his land. The fact that the bathhouse has been identified as an "historic building" does not exempt the land from rates. Mr Frith does not have standing to bring claims for compensation in respect of property that he does not own. There is no evidence as to what funding, if any, the government has provided to the Rotorua District Council in respect of "nationally significant natural areas" or if there is such finding, how it is to be allocated or administered. If an action was brought by someone who did have legal standing to bring such a claim, leaving aside for a moment the merits or lack of them in respect of such a claim, the claim would be in respect of a judicial review of administrative action and not within the jurisdiction of the District Court.

Summary

For the reasons outlined above, the plaintiff's claim must fail. There will be judgment for the defendant. The defendant is entitled to costs. Submissions as to costs are to be filed and served by the defendant within 10 days. Any response by the plaintiff to be filed and served within 10 days of service of the defendant's submissions.

P W Cooper
District Court Judge